Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF CISCO SYSTEMS, INC.

Jeffrey A. Campbell
Director
Technology and Communications Policy

CISCO SYSTEMS, INC.
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 661-4006

Timothy J. Simeone

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Cisco Systems, Inc.

May 28, 2004

TABLE OF CONTENTS

SUMMARY

The emergence of IP-enabled networks and services has revealed fundamental shortcomings in a regulatory regime designed for different technology and different market conditions. The core goals of the Telecommunications Act, however, provide valuable assistance in charting a course toward a more fitting regulatory regime. These fundamental goals – competition, deregulation, and innovation – should guide the Commission in this proceeding.

Bearing these goals in mind, the Commission should clarify that IP-enabled services are interstate and, therefore, subject to exclusive federal jurisdiction. This conclusion, rooted in the Internet's fundamental separation from geography, will end ongoing efforts of many states to regulate IP-enabled services – and eliminate the prospect of destructive and inconsistent regulation in fifty-one different jurisdictions.

When exercising its exclusive jurisdiction over IP-enabled services, the Commission should tread as lightly as possible. Regulation should apply only where necessary and only to IP-enabled voice services that are substitutes for plain old telephone service. Thus, the Commission should entirely forego legacy economic regulation, which has no place in the competitive IP environment. But to ensure that consumers have full access to IP voice services, the Commission should also afford IP voice providers certain rights, such as the right to the non-discriminatory exchange of traffic, the right of access to numbering resources, and the right of access to emergency facilities. The Commission should also recognize that IP voice providers must help achieve important social policy objectives, but it should avoid any mandates if possible, and should never mandate particular solutions. Rather, the Commission should allow IP voice providers to implement creative solutions that meet consumers' needs efficiently.

Finally, the Commission must recognize that its jurisdiction over IP-enabled services is limited. The Communications Act of 1934, as amended, does not grant the Commission authority over end-user applications. Moreover, IP-enabled services are "information services," over which the Commission exercises only limited regulatory authority. Finally, to the extent that the transmission component of some IP-enabled services falls within the Commission's Title II authority, traditional common carrier regulation is neither necessary nor required.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF CISCO SYSTEMS, INC.

Cisco Systems, Inc. ("Cisco") is the world's leading manufacturer of IP networking equipment and IP telephony hardware and software. Since the company's inception, Cisco's engineers have been leaders in the development of IP networking technologies. The company's tradition of IP innovation continues with industry-leading products in its core areas of routing and switching, as well as advanced technologies in IP telephony and other IP-enabled services.

With its unrivaled expertise in IP infrastructure, Cisco has a keen interest in a properly formulated regulatory regime. It believes that as the Commission begins to explore the appropriate regulatory environment for a communications sector that is rapidly moving to IP networking, it must be cautious in its approach and take one step at time – lest it inadvertently interfere with the extraordinary innovation and competition that has characterized IP networking. In particular, Cisco urges the Commission to strictly limit its foray into regulation of IP networks, services and applications to those issues presented by real-time, two-way, voice communication services that serve as a substitute for ordinary telephone service. Even then, the Commission must ensure that any regulation adopted is necessary in the specific context of IP technologies, and not a reflection of outmoded legacy regulation.

INTRODUCTION

Notwithstanding the complexities it has spawned, the Telecommunications Act of 1996 was enacted to advance straightforward goals. Congress passed the legislation "[t]o promote competition and reduce regulation" in hopes of "encourag[ing] the rapid deployment of new telecommunications technologies."[1] Congress recognized that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," and it articulated a policy of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[2]

These core statutory goals – competition, deregulation, and innovation – should permeate the process of considering any regulatory regime adapted to IP-enabled services. As the Commission said in its Notice of Proposed Rulemaking ("*NPRM*"), allowing the Internet to be free of traditional regulatory obligations has resulted in "one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development in the United States in the last ten years."[3] As new IP-enabled services accelerate those benefits, the Commission must ensure that actions taken in this proceeding do not stunt innovation and growth.

In these Comments, Cisco makes several suggestions for how the Commission may address IP-enabled services while continuing to advance the core goals of the 1996 Act. *First*, the Commission should clarify that it has exclusive jurisdiction over all IP-enabled services. *Second*, the Commission should narrowly target any regulation to issues created by IP voice services that substitute for ordinary telephone service. The Commission should limit its focus to

---

1 Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56 (1996) (preamble not codified; other provisions codified in various sections of Title 47).

2 47 U.S.C. § 230(a)(4) & (b)(2).

3 *IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 ¶ 1 (2004) ("*NPRM*").

safeguarding the minimum rights necessary to ensure that consumers continue to have access to the services of their choice, and to addressing critical social issues through the lightest regulation possible. *Third*, the Commission should recognize important limits on its authority in the IP arena. Significantly, the Commission probably lacks authority to regulate end-user applications,[4] which simply are not "*communication* by wire and radio."[5] Moreover, even as to IP-enabled *services*, the Commission's regulatory authority is limited because the 1996 Act places "information services" beyond the reach of all regulation not strictly "necessary" to the implementation of specific statutory directives. Finally, even should the Commission determine that it has Title II jurisdiction over the transmission component of some IP-enabled services, such regulation is generally neither necessary nor required.

ARGUMENT

I. THE COMMISSION SHOULD CLARIFY THAT IP-ENABLED SERVICES ARE INTERSTATE.

The Commission's first step in this proceeding should be to reaffirm that all IP-enabled services and transmissions are interstate and subject only to federal jurisdiction. This will free IP-enabled service providers from conflicting and burdensome state regulation that even now threatens to eliminate the efficiencies that IP networks and services bring to the American public.

The Commission raises the question of jurisdiction in the *NPRM* and recognizes the threat that state regulation poses.[6] Illustrating the uneven patchwork of state regulation that has started to emerge "[e]ven at this early stage,"[7] the Commission describes the Minnesota Public

---

4 The *NPRM* uses the terms "applications" and "services" without definition. In these Comments, the term "application" is used to denote end-user software, as opposed to software utilized by a service provider to provide its services.

5 47 U.S.C. § 151 (emphasis added).

6 *See NPRM* ¶¶ 38-41.

7 *Id.*¶ 34.

Utilities Commission's assertion of jurisdiction over Vonage's IP-enabled voice service,[8] and it lists numerous other proceedings underway in other states.[9] The patchwork has grown more mottled in the weeks since the Commission issued the *NPRM*, as the New York Public Service Commission has determined that Vonage's service is a "telephone corporation" under New York law and, therefore, subject to the state's regulatory oversight.[10]

In the *NPRM*, the Commission acknowledges the apparently interstate nature of IP services, noting that "[p]ackets routed across a global network with multiple access points defy jurisdictional boundaries."[11] After summarizing its *Pulver Order* – holding Free World Dialup ("FWD") is jurisdictionally interstate – the Commission inquires in the *NPRM* whether the same reasoning applies to IP-enabled services more generally.[12] It *does*.

The key consideration underlying the FCC's jurisdictional analysis in the *Pulver Order* – that "Internet applications like FWD . . . separate the user from geography"[13] – applies with equal force to all IP-enabled services. Because the endpoints of IP-enabled traffic are not tied to fixed geographic points, it is practically impossible to track the traffic's geographic flow.[14] It is

---

8 *See id.* ¶ 34 n.114. The Commission explains that a federal court in Minnesota overturned the Minnesota Commission's decision. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 996 (D. Minn. 2003).

9 *See NPRM* ¶ 34 n.113.

10 *See Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corporation Concerning Provision of Local Exchange and InterExchange Telephone Service in New York State in Violation of the Public Service Law*, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation, Case 03-C-1285, at 9-15 (May 21, 2004).

11 *Id.* ¶ 4.

12 *See id.*

13 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* Memorandum Opinion and Order, 19 FCC Rcd 3307 ¶ 4 (2004) ("*Pulver Order*").

14 Of course, as SBC recently explained, "tracking theoretically could be 'possible,' if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service-driven* reason for committing those resources to develop such tracking capabilities." *Petition of SBC Communications Inc. for a Declaratory Ruling*, WC Docket No. 04-29, at 38 (filed Feb. 5, 2004) (emphasis in original).

therefore impossible to ascertain whether and which jurisdictional boundaries a particular IP-enabled communication crosses (and, in truth, even when the endpoints are two different rooms in the same home, it is likely parts of the communication have traveled across several state lines). Without information about the traffic's jurisdictional course, it is similarly impossible to separate IP-enabled traffic into intrastate and interstate components.

In the *Pulver Order*, the Commission drew a bright line between interstate and intrastate jurisdiction, clarifying the boundaries of states' regulatory authority. The Commission explained that federal jurisdiction is exclusive unless the service in question "can be characterized as 'purely intrastate,'" or unless "it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed . . . service without negating federal objectives for the interstate component."[15]

The first basis for state jurisdiction is inapplicable since IP-enabled services are not purely intrastate. In the *Pulver Order*, the Commission stated "it is evident that the capabilities FWD provides its members are not purely intrastate capabilities" because FWD users are able to continually change their location, ensuring that some of their communications cross jurisdictional boundaries.[16] It is likewise "evident" that other IP-enabled services are not purely intrastate because users can make use of such services from any point on the planet where there is a connection to the Internet.

The second basis for state jurisdiction is also inapplicable to IP-enabled services, because it is not practical (and presently not possible) to segregate their interstate and intrastate components. The Commission reached this conclusion with respect to FWD in the *Pulver Order* after observing that only FWD users themselves "know where the end points [of the

15 *Pulver Order* ¶ 20.

16 *Id.*

communication] are."[17] The same reasoning applies to all IP-enabled services – since, as noted above, it is currently impossible to determine whether the endpoints of an IP-enabled communication are located within a single state's borders, it is also impossible to categorize any individual communication as interstate or intrastate. IP-enabled services thus qualify as jurisdictionally interstate under the Commission's "mixed-use" doctrine. When a service carries "mixed" interstate and intrastate traffic that is impractical to segregate by jurisdiction, "the Commission has declared such traffic to be interstate in nature."[18]

Forcing providers to track the bit streams associated with IP-enabled services would undermine important federal objectives: As the Commission explained in the *Pulver Order*, it would "forc[e] changes . . . for the sake of regulation itself, rather than for any particular policy purpose."[19] The same is true for other IP-enabled services because any effort to separate their interstate and intrastate components "would involve the installation of systems that are unrelated to providing . . . service to end users."[20] As the Commission observed with respect to FWD, "[i]nvestment in such systems would improve neither service nor efficiency," and would "almost certainly be significant and negative for the development of new and innovative IP services and applications."[21] In sum, the Commission should make clear that its jurisdictional holding in the *Pulver Order* applies to all IP transmission and services.

---

17 *Id.* ¶ 21.

18 *Id.* ¶ 22; *see also GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998).

19 *Pulver Order* ¶ 21.

20 *Id.* ¶ 24.

21 *Id.*

II. THE COMMISSION SHOULD NARROWLY TARGET ANY REGULATION TO IP VOICE SERVICES COMPETING WITH POTS AND AVOID LEGACY REGULATION.

Above all else, the Commission must be careful in this proceeding not to extend regulation to applications and services where regulation is not needed. Otherwise, the Commission will risk undermining the extraordinary growth in IP networks, services and applications – and the economic and social gains that growth has enabled.

As a general rule, the Commission should not impose any regulation on IP services or applications, with the sole exception of those IP voice services that substitute for plain old telephone service (POTS). But even for those IP voice services, the Commission should not apply legacy regulation and should regulate, where necessary, with a very light hand. *First*, legacy economic regulation designed for the conditions of the traditional PSTN has no place in the robust competitive market for IP voice services that substitute for POTS.[22] *Second*, to enable consumers to access IP voice services designed to substitute for POTS, the Commission should accord the providers of such IP voice services certain rights: the right to exchange traffic; the right to use telephone numbers from the North American Numbering Plan; and the right to access necessary emergency facilities. *Third*, to the extent that the Commission seeks to ensure that IP voice service operators address certain social responsibilities that POTS providers bear, the Commission should recognize the differences in technologies and allow IP voice service operators to develop the most efficient means of meeting those obligations.

---

[22] They have even less place in the broader market for IP services, and no place in the market for applications.

A. Legacy Economic Regulation Should Not Apply to the Highly Competitive IP-Enabled Services Market.

In the *NPRM*, the Commission inquires about the propriety of imposing economic regulation on IP-enabled service providers.[23] As noted above, there is no conceivable reason to apply regulation – let alone traditional economic regulation – to the IP services market generally. Such regulation would be a solution looking for problem. It would do much harm, and no good.

The same is true for IP voice services that substitute for POTS. The existing economic regulations in Title II (and the rules the Commission has promulgated thereunder) were designed primarily to constrain the government-created monopoly forces that pervaded traditional wireline service. Such restraints are unnecessary in the competitive world of IP-enabled voice services, where market forces will produce far better results than regulatory fiat.

The current intercarrier compensation regime is an example of outmoded economic regulation that should not be applied to VoIP services. Indeed, that non-cost-based regime no longer makes sense even in the context of the PSTN – hence the Commission's ongoing *Intercarrier Compensation* proceedings, targeted to replacing the presently fragmented and irrational intercarrier compensation regime with a single, unified system.[24] The irrationality of the current regime is, moreover, greatly magnified in the context of IP communications, because intercarrier compensation is based on the physical endpoints of a call. As discussed above, it is virtually impossible to ascertain the endpoints of an IP-enabled communication. Accordingly, applying the existing access charge regime to VoIP providers would be forcing a square peg into a round hole. The Commission should proceed by completing reform of the intercarrier

---

[23] *See NPRM* ¶¶ 73-74.

[24] *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

compensation system – taking the emergence of VoIP into account – rather than imposing intercarrier compensation on VoIP providers in this proceeding.

Nor should the Commission impose other legacy economic regulation. While regulation may have been required historically to ensure, for example, that monopoly common carriers formatted bills clearly or imposed reasonable payment terms, such micro-management is plainly unnecessary in the competitive IP arena. Most fundamentally, IP-enabled voice service providers must compete vigorously for customers, and that competition will ensure that customers receive bills in the formats they demand and that their payment terms are reasonable. Moreover, to the extent that VoIP service providers do not fall within the statutory definition of common carriers, they remain subject to federal unfair trade practice laws.[25] In short, economic regulation of IP-enabled services would have counterproductive effects: Providers will bear the cost of adopting mandated procedures, and will be stuck with these procedures rather than more effective alternatives that competitive forces would produce in response to consumer demand.

Imposing legacy regulation on emerging technologies would be counterproductive in other ways as well. The Internet is, of course, a truly global medium, and to the extent that the Commission burdens IP communications with cumbersome and expensive regulation in this country, U.S. companies will suffer. As Chairman Powell said to the National Association of Regulatory Utility Commissioners:

> If we do not create a regulatory climate that attracts and encourages investment in our states and in our Nation, we will face the rude reality that opportunity can and will go elsewhere. If the regulatory climate is hostile, the information age jobs go to India not Appalachia. If regulatory costs are excessive, email, voice and video servers will be set up in China not California . . . We are well-advised to pursue

[25] *See* 15 U.S.C. § 45(a)(2) (exempting common carriers from such scrutiny).

> regulatory policies that invite, nurture and promote innovative activity in the digital age, or we stand to lose out on its rewards.[26]

Limiting unnecessary regulation will enable U.S. enterprises and workers that participate in the global market for IP-enabled services to compete with foreign companies without undue regulatory uncertainty and expense.

B. The Commission Should Continue to Ensure that Consumers Have Access to IP Voice Services that Compete with POTS.

Although most traditional sector-specific economic regulation is unnecessary in the IP context, lingering bottlenecks and market distortions may prevent rollout of IP voice services to compete with POTS if the Commission fails to protect a few critical rights of IP voice service providers. In considering which rights to preserve, the Commission should concentrate (as always) on the statutory goals of competition, innovation, and deregulation. Those objectives suggest that the Commission should focus primarily on the following three rights:

1. **Non-discriminatory interconnection for the exchange of traffic**. IP voice service providers must be assured that their customers' traffic can reach the PSTN, and that traffic originating on the PSTN can reach their customers.

2. **Access to telephone numbers and directories.** IP voice service providers must have full access to North American Numbering Plan numbers. Without them, exchanging traffic between IP networks and the PSTN will present significant and unnecessary technical challenges, and consumers will not perceive IP voice services to be a reliable option. Likewise, numbers assigned to IP voice services must be published in directories alongside numbers associated with the PSTN.

3. **Access to necessary emergency facilities.** IP voice service providers must have access to emergency facilities such as 911 and E911 call centers. Consumers will reject an IP voice service otherwise substitutable for PSTN service if they cannot reach emergency services.

If these issues are addressed, IP voice service providers will bring needed competition to POTS.

---

[26] Federal Communications Commission Chairman Michael K. Powell, Remarks at the National Association of Regulatory Utility Commissioners General Assembly, Washington, DC (March 10, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf.

C. The Commission Should Mandate that Providers of IP Voice Services Address Social Policy Concerns Only Where Necessary.

IP voice services that are substitutable for POTS should, of course, address critical social policy concerns such as public law enforcement assistance and subscribers' access to 911 or E911 emergency facilities. The Commission should not, however, automatically discount the ability of competitive markets to address such matters without prescriptive regulation. Moreover, even if it concludes that regulation is required, the Commission must be careful not simply to impose regulation designed for the PSTN. Rather, any necessary regulation must be tailored to the realities of IP technology and networks.

Even the most vital public policy objectives should be secured through the lightest possible regulation. In the competitive market for IP voice services, the marketplace may be more responsive to social needs than regulation. Accordingly, in the first instance, the Commission should refrain from imposing top-down requirements and, instead, allow the industry to propose and implement creative solutions that meet consumers' needs efficiently.

The IP industry's track record suggests that market forces can produce better results than regulation. For instance, the National Emergency Number Association has been working with the IP industry for more than two years to develop a forward-looking E911 service for IP platforms.[27] Likewise, the Emergency Services Interconnection Forum – a working group within the Alliance for Telecommunications Industry Solutions – has devoted considerable resources to solving potential technical issues associated with IP-enabled services and enhanced 911 features.[28] Through these voluntary industry efforts, IP-enabled service providers have reached

[27] *See* National Emergency Number Association, The NENA 9-1-1 Future Path Plan — Target for 9-1-1 Evolution, *available at* http://www.nena.org/9-1-1TechStandards/ future_path_plan.htm.

[28] *See ATIS Responds to VoIP Challenges in Reaching 911: Launches New Committee to Develop Technical Solution for IP Based Systems*, ATIS Press Release (Feb. 2, 2004), *available at* http://www.atis.org/PRESS/pressreleases2004/020204.htm (announcing the establishment of a new IP

agreement on many basic principles such as a preliminary time line for emergency service and the need to coordinate closely with relevant public safety answering points when deploying IP-enabled services with 911 capabilities.[29] These voluntary E911 efforts may produce results that transcend the limitations of the PSTN – for example, by permitting transmission of critical video and data alongside emergency voice connections.

The IP-enabled services industry is well equipped to develop the most efficient and creative solutions to pressing social concerns. As a result, the Commission should refrain from mandating reflexively that IP-enabled service providers take specific steps to satisfy social objectives. Instead, the Commission should articulate the objectives industry must meet, and then leave the providers (spurred by productive market forces) to conceive the best solutions. Finally, even if the Commission concludes the some regulation is needed, it should make sure that it does not impose legacy regulation that would impede the development of solutions based on the strengths of IP technology.

III. THE COMMISSION'S JURISDICTION OVER IP-ENABLED APPLICATIONS AND SERVICES IS LIMITED, AND REGULATION SHOULD BE EVEN MORE LIMITED.

In this proceeding, the *limits* on the Commission's authority are at least as important as the authority it may exercise. First, the Commission probably does not have regulatory authority over end-user applications since its authority extends only to "*communication* by wire and radio."[30] Second, IP-enabled "services" are generally "information services" under the 1996 Act, and therefore subject only to limited regulation. Finally, even should the Commission

Coordination Ad Hoc Committee to "contribute to the planning, development, and architectural design of an overall IP-based [Enhanced 911] system").

29 *See Public Safety and Internet Leaders Connect on 911*, Joint VON Coalition – NENA Press Release (Dec. 1, 2003), *available at* http://www.von.org/usr_files/ VOIP%20press%20release%20FINAL%20112803.

30 47 U.S.C. § 151 (emphasis added).

determine that it has Title II jurisdiction over the transmission component of some IP-enabled services, such regulation is generally neither necessary nor required.

A. The Commission Lacks Authority Over End-User IP Applications.

The *NPRM* appears to suggest that the Commission has virtually unlimited authority over all things related to the Internet. Indeed, the first footnote of the *NPRM* defines the term "IP-enabled" services, used throughout the document, to include all "services *and* applications relying on the Internet Protocol family."[31] Of course, today almost everything touching the Internet "rel[ies] on the Internet Protocol family," from end-user software, to network hardware, to Web sites. Moreover, in footnote 155, the Commission suggests that it could do such things as "apply E911 obligations on an Internet retailer, or to tariff an online newspaper offering," although it might not "be sensible" to do so.[32]

The Commission's unbounded view of its authority over the Internet is both troubling and incorrect. To begin, the Commission probably cannot regulate pure "applications" as that term is used in these Comments – *i.e.*, end-user software, as opposed to software utilized by a service provider to provide its services.[33] Such software does not constitute "communication by wire or radio,"[34] the *broadest* possible articulation of the Commission's sphere of authority in the Communications Act. Plainly, software standing alone is not a "telecommunications service"[35] or an "information service,"[36] over which the Commission has jurisdiction. In short, Cisco believes the Communications Act to require that there be a communications *service* as a

---

31 *NPRM* ¶ n.1 (emphasis added). Notably, the Commission does not explain what, in its view, is the distinction between "services" and "applications."

32 *Id.* ¶ 48 n.155.

33 *See supra* n.4.

34 47 U.S.C. § 151.

35 47 U.S.C. § 153(46).

36 47 U.S.C. § 153(20).

prerequisite to regulation, and a "service" requires a service *provider* of some sort. The Commission probably cannot regulate end-user software standing alone, however it is used.

B. Most IP-Enabled Services are "Information Services" Subject to Little or No Regulation.

The Commission's authority over communications services is, in turn, limited in the realm of IP-enabled services. In particular, under the 1996 Act, IP-enabled services are "information services" subject only to very limited regulation.

The 1996 Act distinguishes "information services," which offer the "capability" for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,"[37] from "telecommunications," which involves the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[38] Only "telecommunications" offered for a fee to the public constitute "telecommunications services"[39] subject to the common carriage obligations of Title II.[40] Neither "information services" – nor "telecommunications" *not* offered to the public – are subject to such Title II regulation.

Providers of Internet services, such as email, instant messaging, or VoIP services, do not provide "telecommunications services" within the meaning of these statutory distinctions.[41] The Commission's decision on pulver.com's VoIP Petition so demonstrates. The Commission there first found that Free World Dialup (FWD) "is not 'telecommunications.' Under the statute, the

---

37 47 U.S.C. § 153(20).

38 47 U.S.C. § 153(43).

39 47 U.S.C. § 153(46).

40 *See, e.g., Pulver Order* ¶ 10.

41 *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Comments of Cisco Systems, Inc., WC Docket No. 03-211, at 4 (filed Oct. 27, 2003).

heart of ‘telecommunications’ is transmission,” and “Pulver neither offers nor provides transmission to its members.”[42] The Commission went on to find that FWD also “is not a ‘telecommunications service,’” because such services involve an “offering of telecommunications.”[43]

The Commission correctly concluded that FWD is an “*unregulated* information service.”[44] It explained that its finding “will facilitate the further development of FWD and Internet applications like it and these offerings, in turn, will encourage more consumers to demand broadband service.”[45] “To rule otherwise would effectively apply a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network,” at the risk of “eliminating an innovative service offering that . . . promotes consumer choice.”[46] In short, the Commission found that Title II regulation does not apply to FWD. The same conclusion applies to other IP applications and services.

The *NPRM* suggests that even when a service does not fall within Title II, the Commission may not lack jurisdiction altogether: “Section 1 of the Communications Act established the Commission ‘[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio,’” and section 4(i) “authorize[s] the Commission to ‘perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with

---

42 *Pulver Order* ¶ 9.

43 *Id.* ¶ 10.

44 *Id.* ¶ 1 (emphasis added).

45 *Id.* ¶ 19.

46 *Id.*

this Act, as may be necessary in the execution of its functions.'"[47] The Commission's authority under these provisions is frequently denominated "ancillary jurisdiction."

The scope of the Commission's ancillary jurisdiction is somewhat unsettled, but is surely not as broad as Commission has implied in this *NPRM*. In *United States v. Southwestern Cable Co.*,[48] the Supreme Court upheld an FCC enforcement action against a cable operator that had improperly extended carriage of a television signal beyond FCC-authorized limits on the ground that such enforcement authority was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[49] Four years later, in *Midwest Video I*,[50] the Court similarly upheld a rule requiring cable systems to have "available facilities for local production and presentation of programs," on the ground that the rule was reasonably ancillary to the Commission's broadcast regulation because it served the same "broadcasting policies."[51] But *Midwest Video II* identified important limits on the scope of ancillary jurisdiction,[52] defining "ancillary" jurisdiction to include only rules affirmatively "*necessary* to ensure the achievement of the Commission's statutory responsibilities."[53] Accordingly, under Title I, any FCC regulatory authority is limited to that "necessary" to the implementation of specific statutory directives. This limitation puts most IP services beyond the Commission's Title I jurisdiction.

---

47 *NPRM* ¶ 46. Notably, however, Professors Thomas Merrill and Kathryn Watts have recently contended that the latter provision is not a grant of legislative authority to the FCC at all, but only a grant of housekeeping authority empowering the agency to set rules of internal procedure. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 517-19 (2002).

48 *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

49 *Id.* at 178.

50 *United States v. Midwest Video Corp.,* 406 U.S. 649, 653 (1972) ("*Midwest Video I*") (Opinion of Justice Brennan, joined by Justices White, Marshall and Blackmun).

51 *Id*. at 669.

52 *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*").

53 *Id.* at 706 (emphasis added).

In any event, the Commission should be reluctant to impose regulation under Title I. In the competitive market for IP-enabled services, the marketplace may be more responsive to social needs than regulation. Accordingly, the Commission may wish to follow a path similar to that of the Cable Modem proceeding, in which – following the initial determination that cable modem service is an interstate information service – the Commission invoked ancillary authority under Title I to seek further comment on specific issues.[54] Taking that approach here would allow the Commission and industry participants to build a record regarding whether particular social policy regulation is truly "necessary" in a competitive market.

C. Even if IP Transport is "Telecommunications," Title II Common Carrier Regulation is Neither Necessary Nor Required.

As discussed above, and as the Commission suggested in its *Pulver Order*, Internet applications and services generally lie outside of Title II. Arguably, however, offerings of pure transmission, even in the IP context, might constitute "telecommunications services" potentially subject to Title II regulation.[55] In *AT&T Corp. v. City of Portland*,[56] the Ninth Circuit held "that the transmission element of cable broadband service"[57] does "constitute[] telecommunications service."[58] Subsequently, in *Brand X Internet Services v. FCC*,[59] the Ninth Circuit reaffirmed its *City of Portland* decision.[60] And more recently still, the Commission's decision on the AT&T VoIP petition ruled that IP transmission – *i.e.*, AT&T's routing "of a portion of its interexchange

---

[54] Those issues included access requirements. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking,17 FCC Rcd 4798 ¶¶ 100-109 (2002), *rev'd sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[55] *See NPRM* ¶ 47.

[56] 216 F.3d 871 (9th Cir. 2000).

[57] *Brand X*, 345 F.3d at 1129 (describing and reaffirming *City of Portland* decision).

[58] *Id.*

[59] *Id. at* 1120.

[60] *Id.* at 1130.

traffic . . . over [its] Internet backbone" – may constitute a "telecommunications service" as defined by the Act."[61]

Cisco disagrees with the result of *City of Portland* and *Brand X*, which may yet be reviewed and reversed by the Supreme Court. In any event, as a policy matter, it makes no sense to attempt to separate the transmission and information service portions of a unified service and to address them under separate titles of the Communications Act. Accordingly, even if the Ninth Circuit decisions stand, the Commission can and should invoke its forbearance authority to decline to apply the full panoply of Title II regulation to IP transport providers.

CONCLUSION

It is by now a truism that IP-enabled services are changing communications in fundamental ways, as they offer new service opportunities to consumers and inject competitive forces into the market. In crafting rules for these emerging technologies, the Commission must be careful not to impose regulation that will prevent them from flourishing.

Thus, as explained above, the Commission should clarify that its authority over IP-enabled services is exclusive but limited. In accordance with its limited authority, the Commission should focus on enforcing several specific rights necessary to safeguard the continuing vitality of Internet-enabled services, while eschewing far-reaching regulation of the sort now imposed under Title II. Thus clearing away the underbrush of legacy regulation will allow the Commission to advance the core goals of competition, deregulation, and innovation.

[61] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, *Order*, WC Docket No. 02-361, FCC 04-97 ¶ 12 (rel. Apr. 21, 2004).

Respectfully submitted,

CISCO SYSTEMS, INC.

Timothy J. Simeone

Jeffrey A. Campbell
Director
Technology and Communications Policy

CISCO SYSTEMS, INC.
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 661-4006

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for Cisco Systems, Inc.

May 28, 2004